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# Essay

## THE PROMISE OF SENIOR JUDGES

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**ABSTRACT**—Judges, lawmakers, and scholars have long debated whether the federal courts of appeals are understaffed and, if so, how Congress should go about redressing that fact. Even though there is currently a strong argument that some new judgeships should be created, such a path presents logistical complications. If a significant number of seats are added to the appellate bench, circuits may eventually become too large to function well. And if a significant number of circuits are ultimately split, the total number of federal appellate courts may become too large for the judiciary as a whole to function well. Furthermore, there are political complications. Congress may be disinclined to authorize new judgeships, as has been the case for the past thirty years.

But this does not mean that there is no smooth path to increasing judge power at the courts of appeals. Indeed, a promising possibility exists that rests almost entirely within the judiciary's control: raise the incentives (and lower the disincentives) for taking senior status. Currently, when a judge has satisfied the "Rule of 80" (meaning that the judge is sixty-five or older and his or her age plus years of service totals eighty or more), that judge can leave regular active service. The judge can elect to continue hearing cases and assist the court as a senior judge, but "going senior" also creates a vacancy that can be filled with another judge, thereby adding to the court's overall capacity. There are currently more than sixty judges who are eligible to take senior status, amounting to a third of *all* authorized federal appellate judgeships—the possible gains are considerable.

This Essay begins the task of identifying and proposing stronger incentives for federal appellate judges to take senior status. As part of a larger research project on the internal operations of the federal courts of appeals, it relies upon interview data with judges and survey data from court administrators to identify the different ways senior judges are treated across the courts of appeals. These variations in practice are important to document, particularly since some of them were unknown even to members of the judiciary. But these variations also highlight possible changes that could improve the balance of incentives for taking senior status.

Ultimately, the Essay's reform proposal involves modest changes that could create substantial benefits in terms of judge power. Its promise lies with appreciating the finer details of court administration, including which can feasibly be altered. Just as importantly, its promise lies with not relying upon the actions of the elected branches, but upon changes that can be made by the courts themselves.

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## INTRODUCTION

What is the ideal size of the federal courts of appeals? How many judges should there be, and upon how many benches should they sit? What would seem like straightforward questions have occupied court administrators, judges, and academics (not to mention Congress) since nearly the courts'

inception in 1891.<sup>1</sup> Over the last 130 years, the number of appellate courts has increased from 9 to 13,<sup>2</sup> and the number of appellate judgeships has increased from 19 to 179.<sup>3</sup> Propelling the courts' expansion has been a growing caseload, though the caseload has been winning the race for some time. As court scholars have noted, despite the addition of nearly sixty judges in the past fifty years,<sup>4</sup> the average number of cases filed per judgeship has more than doubled in that time.<sup>5</sup> And so, the perennial question of what is the optimal size of the courts of appeals has given way to a perennial proposal: More judges should be added to the courts of appeals.<sup>6</sup>

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<sup>1</sup> The modern federal courts of appeals, first called circuit courts of appeals, originated in 1891 when Congress passed the Evarts Act. *See* Judiciary Act of 1891 (Evarts Act), ch. 517, § 2, 26 Stat. 826. Before 1891, appeals from district courts were taken to the old circuit courts "in civil actions . . . where the matter in dispute exceeds the sum or value of fifty dollars," Judiciary Act of 1789, Pub. L. No. 1-20, § 22, 1 Stat. 73, 84, and district court decrees "in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum of value of three hundred dollars," *id.* § 21.

<sup>2</sup> The courts of appeals began with nine circuits. *See* Evarts Act § 3. In 1893, Congress created what would eventually be known as the U.S. Court of Appeals for the D.C. Circuit. *See* Act of Feb. 9, 1893, Pub. L. No. 52-74, 27 Stat. 434, 434. In 1929 it created the Tenth Circuit. *See* Act of Feb. 28, 1929, Pub. L. No. 70-363, 45 Stat. 1346, 1346-47. Congress then created the Eleventh Circuit in 1980. *See* Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, § 2, 94 Stat. 1994, 1994. And it created the Federal Circuit in 1982. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 101, 165, 96 Stat. 25, 25, 50. For more details on this history, see generally Jon O. Newman, *History of the Article III Appellate Courts, 1789-2021, The Evolution of Their Geographic Scope, Number of Judges, and Jurisdiction* (forthcoming 2021) (on file with journal).

<sup>3</sup> For a count of the number of federal appellate judgeships and when they were added, see *Chronological History of Authorized Judgeships - Courts of Appeals*, ADMIN. OFF. OF THE U.S. CTS., <https://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-courts-appeals> [<https://perma.cc/7NJJ-S64V>].

<sup>4</sup> *See id.*

<sup>5</sup> *See, e.g.,* Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 CALIF. L. REV. 789, 853 (2020) (noting that the average number of cases per active judge increased from 148 in 1971 to 324 in 2017). These figures do not include the United States Court of Appeals for the Federal Circuit, but the inclusion of filings in that court paints essentially the same picture. *See infra* Section I.A.

<sup>6</sup> Numerous court studies over the past fifty years have ended with calls for expanding the federal appellate bench, including an American Bar Foundation Committee in the 1960s, the Hruska Commission in the 1970s, the Federal Courts Study Committee in the 1980s, and the White Commission in the 1990s. *See infra* Section I.A. The Judicial Conference of the United States has also consistently requested additional judgeships in the last few decades. *See infra* note 143; *see also* Press Release, Admin. Off. of the U.S. Cts., Judicial Conference Seeks New Judgeships – Adequate Compensation for Judges and Others (Mar. 16, 1999), <https://www.uscourts.gov/news/1999/03/16/judicial-conference-seeks-new-judgeships-adequate-compensation-judges-and-others> [<https://perma.cc/U4KB-6K7U>] (noting that the Judicial Conference would request an additional seven permanent and four temporary judgeships in the courts of appeals); Press Release, Admin. Off. of the U.S. Cts., Federal Judiciary Says New Judgeships Needed (Mar. 13, 2007), <https://www.uscourts.gov/news/2007/03/13/federal-judiciary-says-new-judgeships-needed> [<https://perma.cc/54F4-W6VG>] (noting that the Judicial Conference would ask Congress to create fifteen new judgeships for the courts of appeals).

There are a few reasons, though, why the prospect of creating a bevy of new appellate judgeships is not an altogether welcome one. The first concerns logistics. Given that we are not “paint[ing] on a blank canvas,”<sup>7</sup> one has to consider how to go about adding new judgeships to the court system we already have in place. Specifically, should judgeships simply be added to existing circuits? At what point should we consider adding new circuits, out of a concern that existing ones will become too big, thereby threatening uniformity of law through a lack of intracircuit consistency?<sup>8</sup> This concern grows if circuits become so large that they cannot have a single functioning en banc court.<sup>9</sup> And at what point should we worry about having too many circuits, which will invariably create more intercircuit conflicts and potentially lead to the fragmentation of the federal judiciary?<sup>10</sup>

The second reason concerns politics. In the run-up to the 2020 elections, there were numerous calls to expand the Supreme Court, premised on

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<sup>7</sup> Cf. *Gunn v. Minton*, 568 U.S. 251, 257–58 (2013) (Roberts, C.J.) (noting that “[i]n outlining the contours of th[e] slim category” of state law cases that nevertheless “arise[] under federal law” for purposes of federal question jurisdiction, the Court “do[es] not paint on a blank canvas,” and “[u]nfortunately, the canvas looks like one that Jackson Pollock got to first”).

<sup>8</sup> See *Hearing on Oversight of the Structure of the Federal Courts Before the Subcomm. on Oversight, Agency Action, Fed. Rights & Fed. Cts. of the S. Comm. on the Judiciary*, 115th Cong. 10–11 (2018) (statement of Brian T. Fitzpatrick, Professor of Law, Vanderbilt Law School), <https://www.judiciary.senate.gov/imo/media/doc/07-31-18%20Fitzpatrick%20Testimony.pdf> [<https://perma.cc/327L-WA6T>] (addressing the question of when a court of appeals has become “too big” and concluding that the Ninth Circuit in particular “has become so big that it no longer delivers on th[e] promise of uniformity” due to the fact that “three-judge panels on the Ninth Circuit issue so many decisions that the other judges on the court cannot keep up with them all” leading to “many complaints that different three-judge panels within the Ninth Circuit confront the same legal issue and decide it differently because they are unaware that another panel is confronting or has confronted the same issue”).

<sup>9</sup> By statute, an en banc court consists of all active judges of a court and any senior judge who was a member of the panel whose decision is being reheard, 28 U.S.C. § 46(c), except that a court with more than fifteen active judges may determine by local rule the number of judges that serve on an en banc court, Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633. Only the Ninth Circuit has implemented this exception. An en banc court in that circuit consists of the chief judge and ten other active judges selected at random. See 9TH CIR. R. 35-3.

The Ninth Circuit’s limited en banc court is said to have a number of significant problems, including that a majority of the en banc can reach a decision that is at odds with what the majority of the court as a whole believes is the right result, that off-panel judges may not be aware of an imminent en banc opinion that could affect pending decisions (undermining uniformity of law), and off-panel judges may not feel as invested in a given en banc opinion and so feel less compunction about “chipping away” at it in subsequent opinions (also undermining uniformity of law). Pamela Ann Rymer, *The “Limited” En Banc: Half Full, or Half Empty?*, 48 ARIZ. L. REV. 317, 321–23 (2006).

<sup>10</sup> Concerns about precisely how many judges would be added to the bench, among others, have caused some judges to speak out against expanding the courts. See J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1177–78 (1994); Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187, 188 (1993).

Democrats winning the presidency and Senate.<sup>11</sup> Correspondingly, there were calls for resisting such “court packing.”<sup>12</sup> If the Democrats do gain a majority in the Senate in the near future,<sup>13</sup> it is only a matter of time until this debate spills over to the courts of appeals,<sup>14</sup> particularly given the claims that the intermediate appellate courts have been “packed” with a large number of appointees by President Trump<sup>15</sup>—fifty-three or nearly 30% of authorized

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<sup>11</sup> See, e.g., Elaine Godfrey, *The Democrats' Supreme Court Hail Mary*, ATLANTIC (Sept. 28, 2020, 10:11 AM), <https://www.theatlantic.com/politics/archive/2020/09/democrats-case-court-packing/616446/> [https://perma.cc/V68H-BT8S] (explaining the various arguments in favor of packing the Court); Evan Gerstmann, *If the Democrats Regain Power, They Should Pack the Supreme Court. Here's Why.*, FORBES (Sept. 27, 2020, 5:47 PM), <https://www.forbes.com/sites/evangerstmann/2020/09/27/if-the-democrats-regain-power-they-should-pack-the-supreme-court-heres-why/#77b5d9073644> [https://perma.cc/7PEF-F8GV] (arguing that adding more seats would result in a more ideologically balanced Court); Elie Mystal, *There Is Only One Way out of This Crisis: Expand the Court*, NATION (Sept. 23, 2020), <https://www.thenation.com/article/politics/supreme-court-packing/> [https://perma.cc/AS2V-4D43] (arguing that expanding the Supreme Court would be the only way to rectify the imbalance brought on by the Republicans' “theft” of at least two seats); Sam Stein, *Eric Holder Says Next Democratic President Should Consider Court Packing*, DAILY BEAST (Mar. 7, 2019, 7:20 PM), <https://www.thedailybeast.com/eric-holder-says-next-democratic-president-should-consider-court-packing> [https://perma.cc/9XA9-EPZY] (noting that former Attorney General Eric Holder stated that Democrats should consider packing the Supreme Court given what he saw as unprecedented obstruction on the part of Senator Mitch McConnell specifically and Senate Republicans generally); see also Marin K. Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121, 1124–25 (2020) (noting how several candidates running for the 2020 Democratic presidential nomination stated that they would be open to increasing the size of the Supreme Court).

<sup>12</sup> Such calls have come from those on the political right and the political left. See, e.g., Henry Olsen, *Packing the Supreme Court Is a Horrible Idea. Democrats Must Reject It.*, WASH. POST (Sept. 21, 2020, 2:18 PM), <https://www.washingtonpost.com/opinions/2020/09/21/packing-supreme-court-is-horrible-idea-democrats-must-reject-it/> [https://perma.cc/4CCX-X2ZG] (arguing that packing the Court would undermine the independence of the judiciary); Ryan D. Doerfler & Samuel Moyn, *Reform the Court, but Don't Pack It*, ATLANTIC (Aug. 8, 2020), <https://www.theatlantic.com/ideas/archive/2020/08/reform-the-court-but-dont-pack-it/614986/> [https://perma.cc/6R69-LEZR] (arguing that the Court should be disempowered by “transferring some of its existing authority to the democratically accountable branches” rather than expanded).

<sup>13</sup> At the time of this Essay's writing, the outcomes of the two Georgia runoff elections that will determine control of the Senate are not known. See Shane Goldmacher, *With Senate Control Hanging in Balance, 'Crazytown' Cash Floods Georgia*, N.Y. TIMES (Nov. 19, 2020), <https://www.nytimes.com/2020/11/19/us/politics/georgia-senate-races-donations.html> [https://perma.cc/346Y-XNG2].

<sup>14</sup> Indeed, one prominent federal courts scholar has just argued for the expansion of the lower courts. See Leah Litman, Opinion, *Expand the Lower Courts*, N.Y. TIMES (Oct. 27, 2020), <https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-reform.html> [https://perma.cc/Q8DJ-KG2V].

<sup>15</sup> See, e.g., Nathan R. Hardy & Richard L. Jolly, Opinion, *Trump Has Packed the Courts with Right-Wing Ideologues. Democrats, What's Your Plan?*, L.A. TIMES (Dec. 18, 2019, 12:15 PM), <https://www.latimes.com/opinion/story/2019-12-18/donald-trump-judges-federal-courts-conservatives> [https://perma.cc/429Y-2DH3] (arguing that Democrats should pursue judicial reforms in response to Republicans “reshap[ing]” the federal judiciary with hundreds of appointments).

appellate judgeships.<sup>16</sup> It therefore seems safe to surmise that any attempt to substantially expand the courts of appeals would be cast as politically motivated, and the lower courts could suffer for it.<sup>17</sup> If Democrats do not gain a clear majority in the Senate in the near future, Congress may continue the trend of the last three decades and no new judgeships will be forthcoming.

And so, if the answer to the question about the ideal size of the courts of appeals is “bigger than it currently is,” it would seem that there are no easy fixes. But this does not mean that there are no fixes full stop. Indeed, there is at least one fix that is easier than might appear at first blush. This brings us to the topic of senior judges. As any student (or practitioner) of the federal courts knows, senior judges are a special class of judges who have left regular active service and yet still decide appeals as members of the court.<sup>18</sup> “Taking senior status,” among other things, permits judges to elect the percent of an active judge’s full caseload they will take on<sup>19</sup>—with a recent average of between 40% and 50%.<sup>20</sup> But the key point is that in addition to “ameliorat[ing] the problems of expanding caseloads”<sup>21</sup> with their

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<sup>16</sup> See Russell Wheeler, *Trump’s 200th Judicial Appointment: Less than Meets the Eye*, BROOKINGS (June 26, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/26/trumps-200th-judicial-appointment-less-than-meets-the-eye/> [<https://perma.cc/9KWC-DKSA>].

<sup>17</sup> Scholars have made the point that packing the Supreme Court could harm its perceived or sociological legitimacy—that is, the extent to which the public respects the institution. See, e.g., Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2273–75 (2019) (reviewing RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018)) (arguing that packing the Supreme Court could harm its sociological legitimacy); Neil Siegel, *The Anti-Constitutionality of Court-Packing*, BALKINIZATION (Mar. 26, 2019, 10:29 AM), [https://balkin.blogspot.com/2019/03/the-anti-constitutionality-of-court\\_36.html](https://balkin.blogspot.com/2019/03/the-anti-constitutionality-of-court_36.html) [<https://perma.cc/BP5J-WTQ6>] (“[P]acking the Court would substantially increase the public perception that the Court is partisan and political in just the way, and to the same extent, that Congress is, and so would risk jettisoning the significant amount of diffuse support that the Court retains.”). By extension, the same could be true of the lower courts.

<sup>18</sup> See 28 U.S.C. § 371. Taking senior status stands in contrast to retiring (when a judge leaves the bench while receiving a pension) and resigning outright (when a judge leaves office without further compensation). See *id.* §§ 371–73; see also Stephen B. Burbank, S. Jay Plager & Gregory Ablavsky, *Leaving the Bench, 1970–2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 6 n.7 (2012) (explaining the differences between resignation, retirement, and assuming senior status).

<sup>19</sup> See 28 U.S.C. § 294(b).

<sup>20</sup> See Burbank et al., *supra* note 18, at 29 (estimating that, on average, senior circuit judges were carrying a 43.9% caseload in the 1990s and a 45.1% caseload in the 2000s, but then noting that the latter figure could be closer to 53% if senior judges without chambers and staff (who likely do negligible work) are excluded); see also Frederic Block, *Senior Status: An “Active” Senior Judge Corrects Some Common Misunderstandings*, 92 CORNELL L. REV. 533, 540 (2007) (finding comparable figures when looking at senior circuit and district judges).

<sup>21</sup> David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 455 (2007).

continued service, by assuming senior status, each judge also creates a vacancy to be filled by a new active judge.<sup>22</sup> Therein lies the promise of senior judges.

If there were a sufficiently large number of active judges who could take senior status but had not yet done so—and existing barriers to “going senior” could be lowered—a significant number of vacancies could be created and then filled with new judges. These additions would come without expanding the size of each circuit’s en banc court (as those courts generally are composed of active judges only<sup>23</sup>)—and so concerns about disuniformity in law would be allayed.<sup>24</sup> Moreover, these additions in “judge power” could be gained without complex negotiations over how to add new judgeships and would be less politicized than adding seats outright.

Beginning with the first proposition, at last count, more than sixty active judges were eligible to assume senior status.<sup>25</sup> In other words, approximately one-third of the current active judges could become senior judges and create a substantial number of vacancies. Regarding the second proposition, those outside of the judiciary might think that taking senior status does not mean much functionally for a judge, apart from giving him or her the ability to take a reduced caseload. As it turns out, senior status can come with several significant changes to one’s judicial life—although, as even some inside the judiciary do not know, those changes vary from circuit to circuit.

While not publicized and not widely known outside of individual courts, as Judge Jon O. Newman and I learned for a book project on the internal workings of the courts of appeals,<sup>26</sup> in some circuits senior judges

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<sup>22</sup> See 28 U.S.C. § 371(d).

<sup>23</sup> The one exception is that a senior judge who was a member of the panel whose decision is being reheard may choose to serve on the en banc court. *Id.* § 46(c).

<sup>24</sup> As noted earlier, there are concerns that once a court becomes so big that it can rehear appeals only in limited en banc panels, uniformity of law will be undermined. See *supra* note 9 and accompanying text. This proposal avoids adding to the number of active judges, thereby leaving current en banc courts intact. See *infra* Part III.

<sup>25</sup> I arrived at this figure after reviewing the Judicial Center’s Judicial Biographical Directory and determining which current active judges had already satisfied the Rule of 80 based upon their birthdate and commission date. See *Biographical Directory of Article III Federal Judges: Export*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/biographical-directory-article-iii-federal-judges-export> [<https://perma.cc/7G74-Y7QN>] (using data from the file titled “Format 1: Organized by Judge (Flat File)”). This is also consistent with Russell Wheeler’s findings from two years ago. See Russell Wheeler, *Appellate Court Vacancies May Be Scarce in Coming Years, Limiting Trump’s Impact*, BROOKINGS (Dec. 6, 2018), <https://www.brookings.edu/blog/fixgov/2018/12/06/trump-impact-on-appellate-courts/> [<https://perma.cc/TN2X-UMAG>] (estimating that seventy-one appellate judges would be eligible as of July 1, 2020).

<sup>26</sup> JON O. NEWMAN & MARIN K. LEVY, *THE INTERNAL OPERATIONS OF THE FEDERAL COURTS OF APPEALS* (unpublished manuscript) (on file with author).

are not permitted to vote on court rules.<sup>27</sup> Additionally, in at least one circuit, senior judges may have to give up their chambers—where they may have spent decades of their working life—and move to less convenient spaces.<sup>28</sup> Judges have also spoken about a loss in status that comes with becoming senior in some courts—for example, being assigned to sit at the ends of the bench during ceremonial events, beyond even the most junior active judges.<sup>29</sup> In the other direction, some chief judges have noted that they endeavor to treat senior judges as well as possible so as to encourage eligible active judges to take senior status, all to create more vacancies.<sup>30</sup> In these circuits, senior judges not only retain their chambers and place at court functions, but their standing is also improved in other respects.<sup>31</sup> For example, senior judges may be given their first pick of opinions to author coming out of sittings, and their preferences for when they would like to sit are honored before those of active judges.<sup>32</sup>

By documenting all of these aspects of senior status, this Essay hopes to make contributions to an important and growing literature, as well as a critical and timely debate. First, as with the larger book project, it hopes to provide a detailed account of the variation in how senior judges are treated across circuits as part of an emerging body of scholarship about the judiciary's internal operations—in part *for* the judiciary. And second, it hopes to contribute to the current debate about expanding the courts of appeals by providing at least one path forward—a path based on moving more circuits towards adopting practices that would make taking senior status more attractive, thereby creating new vacancies. To be sure, the solution is not a complete one. Not all eligible judges would be persuaded to become senior even if all of the barriers noted here were eliminated, including those who are intent upon waiting until a president of their party is in the White House and can nominate their successor. That said, if even a quarter of eligible active judges became inclined to take senior status, fifteen new judgeships would become available—more than in the last bill to expand the federal courts of appeals, passed thirty years ago.<sup>33</sup>

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<sup>27</sup> See *infra* Part II.

<sup>28</sup> See *infra* Part II.

<sup>29</sup> See *infra* Part II.

<sup>30</sup> See *infra* Part II; NEWMAN & LEVY, *supra* note 26 (discussing data from an interview regarding the Second Circuit, conducted on February 14 and February 24, 2020) (transcript on file with author).

<sup>31</sup> See *infra* Part II.

<sup>32</sup> See *infra* Part II.

<sup>33</sup> The 1990 Judgeship Bill was the last major expansion of the courts of appeals, in which Congress created eleven new circuit judgeships. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 202(a), 104 Stat. 5089, 5098–99.



The Essay proceeds as follows. Part I begins with a brief background on the expansion of the courts of appeals over time. It further details how judges, scholars, and members of Congress have wrestled with whether more judgeships should be added and, if so, how. It then turns to the role of senior judges. Building upon the foundational work of Steve Burbank, S. Jay Plager, and Gregory Ablavsky,<sup>34</sup> along with David Stras and Ryan Scott,<sup>35</sup> this Essay considers when “senior judges” as such were created, the impact of such judges today, and statistics regarding the active judges who are currently eligible to “go senior.” Part II then turns to new data, gathered by surveying court administrators and interviewing twenty current and past chief judges of all of the federal courts of appeals, regarding the rules and policies on senior judges in each circuit. Finally, Part III makes several reform proposals, all in the service of making senior status more attractive, with the ultimate goal of creating vacancies to provide more judge power to the federal judiciary.

## I. OVERVIEW: THE SIZE OF THE COURTS OF APPEALS AND THE ROLE OF SENIOR JUDGES

### A. *The Courts of Appeals*

It took over one hundred years from the time Congress created the original circuit courts, in 1789,<sup>36</sup> to create a structure of modern courts of appeals.<sup>37</sup> And then, Congress could not help but quickly enlarge its new creation. Only two years after the Evarts Act, the statute that gave life to nine intermediate appellate courts,<sup>38</sup> Congress added another—what would eventually be styled the United States Court of Appeals for the District of Columbia Circuit.<sup>39</sup> The Tenth and Eleventh Circuit Courts of Appeals were later created in 1929<sup>40</sup> and 1980,<sup>41</sup> respectively. And the United States Court

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<sup>34</sup> See Burbank et al., *supra* note 18.

<sup>35</sup> See Stras & Scott, *supra* note 21.

<sup>36</sup> See Judiciary Act of 1789, Pub. L. No. 1-20, § 4, 1 Stat. 73, 74–75.

<sup>37</sup> See Evarts Act, ch. 517, § 2, 26 Stat. 826, 826–27 (1891).

<sup>38</sup> See *id.*

<sup>39</sup> See Act of Feb. 9, 1893, ch. 74, 27 Stat. 434, 434–35.

<sup>40</sup> Specifically, in 1929 Congress created the United States Court of Appeals for the Tenth Circuit. See Act of Feb. 28, 1929, ch. 363, 45 Stat. 1346, 1346–47.

<sup>41</sup> In 1980, Congress created the United States Court of Appeals for the Eleventh Circuit out of the old Fifth Circuit. See Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, § 2, 94 Stat. 1994, 1994.

of Appeals for the Federal Circuit followed in 1982<sup>42</sup> out of what had earlier been the Court of Customs and Patent Appeals.<sup>43</sup>

It is not only the number of courts that has grown, but also the number of judges who sit on each court. Before the passage of the Evarts Act, Congress had created dedicated “circuit judges,” one for each circuit, to sit, alongside district judges and Supreme Court Justices, on the then-nine circuit courts (the precursors to the modern courts of appeals).<sup>44</sup> One additional circuit judge was later bestowed upon the Second Circuit alone in 1887.<sup>45</sup> To this stable of ten judges, Congress authorized the addition of nine more—again, one for each of the then-nine circuits—through the Evarts Act itself in 1891.<sup>46</sup> For the next hundred years, almost no decade went by without the addition of new seats to the federal appellate bench.<sup>47</sup> And in that time, the total number of appellate judges expanded from the original 19 to 179.<sup>48</sup> But that expansion stopped after the Civil Justice Reform Act of 1990, which created eleven new circuit judgeships.<sup>49</sup> The federal courts of appeals have now been held at that size for thirty years.<sup>50</sup>

The expansions of the federal bench—when they occurred—were generally on account of an expanding docket. As I have chronicled elsewhere, the courts of appeals have been defined by a rapidly rising caseload for much of their collective life.<sup>51</sup> In 1892, just one year after the

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<sup>42</sup> Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 101, 165, 96 Stat. 25, 25, 50.

<sup>43</sup> See Act of Mar. 2, 1929, ch. 488, 45 Stat. 1475. For more details on the history of the courts of appeals, see generally Newman, *supra* note 2.

<sup>44</sup> An Act to Amend the Judicial System of the United States, ch. 22, § 2, 16 Stat. 44, 44–45 (1869). For more on the circuit courts, see generally Joshua Glick, Note, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003), providing a thorough historical account of circuit riding, and David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710 (2007), describing the practice of circuit riding, the conditions that finally led to its end, and advocating for its revival.

<sup>45</sup> Act of Mar. 3, 1887, ch. 347, 24 Stat. 492.

<sup>46</sup> Evarts Act, ch. 517, §§ 1–2, 26 Stat. 826, 826–27 (1891).

<sup>47</sup> See *Chronological History of Authorized Judgeships - Courts of Appeals*, *supra* note 3. The only decade in which judges were not added to the bench between 1891 and 1990 is the 1910s. *Id.*

<sup>48</sup> See *id.*

<sup>49</sup> See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 202(a), 104 Stat. 5089, 5098–99.

<sup>50</sup> It is worth noting that while the overall size has held constant at 179 judgeships, one of those judgeships was transferred from the D.C. Circuit to the Ninth Circuit, effective January 21, 2009. Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 509(a), 121 Stat. 2534, 2543.

<sup>51</sup> See, e.g., Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386, 2393–2402 (2014) (reviewing WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS* (2012)); Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 320–25 (2011) [hereinafter Levy, *The Mechanics of Federal Appeals*].

courts were formed, there was an average of 44 filings per judgeship.<sup>52</sup> That number had jumped to 73 by 1950 (even while the number of judgeships had grown from 19 to 75) and jumped again to 137 by 1978 (when the number of judgeships stood at 144).<sup>53</sup> Only a little over a decade later, in 1990, filings per judgeship had risen to 237.<sup>54</sup>

During this time, judges and scholars alike referred to the “crisis” in volume at the courts of appeals,<sup>55</sup> but the expansion of the federal bench stopped in 1990.<sup>56</sup> And the workload did not slow. In 1997 it reached 300 filings per judgeship<sup>57</sup> and hit its high-water mark in 2006 with just over 400 filings per judgeship.<sup>58</sup> The caseload has receded in the last decade; it now stands at about 288 filings per judgeship.<sup>59</sup> But it still remains well above

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<sup>52</sup> See COMM’N ON STRUCTURAL ALTS. FOR THE FED. CTS. OF APPEALS, FINAL REPORT 14 (1998) [hereinafter FINAL REPORT].

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See, e.g., Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 634–35 (1974); DANIEL J. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME (1974); see also Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1112 & n.9 (2011) (noting that the “crisis in volume” literature dates back to the 1960s, and citing the sources noted above as well as first citing Ruth Bader Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges*, 55 U. COLO. L. REV. 1, 7–13 (1983); then citing Lewis F. Powell, Jr., *Are the Federal Courts Becoming Bureaucracies?*, 68 A.B.A. J. 1370, 1371 (1982); and then citing Charles Alan Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949, 949 (1964)).

<sup>56</sup> See *Chronological History of Authorized Judgeships - Courts of Appeals*, *supra* note 3 (providing “dates and legislative authority for establishment, realignment, and creation of additional judgeships for the U.S. Courts of Appeals”). Just note, again, that one judgeship was reassigned from the D.C. Circuit to the Ninth Circuit, effective January 21, 2009. See *supra* note 50.

<sup>57</sup> FINAL REPORT, *supra* note 52, at 14.

<sup>58</sup> This figure was arrived at by combining two data tables from the Administrative Office of the U.S. Courts. The first table notes that there were 70,375 filings during the twelve-month period ending March 31, 2006 in the twelve regional circuit courts of appeals. *U.S. Courts of Appeals – Appeals Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2005 and 2006*, ADMIN. OFF. OF THE U.S. CTS., tbl.B (2006), [https://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/B00Mar06.pdf](https://www.uscourts.gov/sites/default/files/statistics_import_dir/B00Mar06.pdf) [https://perma.cc/X6LX-EUWE]. The second notes that there were 1,613 appeals filed in this same timeframe in the Federal Circuit. *U.S. Courts of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the 12-Month Period Ending March 31, 2006*, ADMIN. OFF. OF THE U.S. CTS., tbl.B-8 (2006), [https://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/B08Mar06.pdf](https://www.uscourts.gov/sites/default/files/statistics_import_dir/B08Mar06.pdf) [https://perma.cc/L2ZL-XKR3]. The two figures combined—71,988—divided by the number of federal appellate judgeships—179—equals approximately 402 filings per judgeship.

<sup>59</sup> This figure was arrived at by combining two data tables from the Administrative Office of the U.S. Courts. The first notes that there were 50,258 filings during the twelve-month period ending March 31, 2020 in the twelve regional circuit courts of appeals. *U.S. Courts of Appeals – Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2019 and 2020*, ADMIN. OFF. OF THE U.S. CTS., tbl.B (2020), <https://www.uscourts.gov/statistics/table/b/federal-judicial-caseload-statistics/2020/03/31> [https://perma.cc/3ULV-VAYJ]. The second notes that there were 1,435 appeals filed in this same timeframe in the Federal Circuit. *U.S. Court of Appeals for the Federal Circuit –*

where it was in 1990, the last time the federal courts of appeals were expanded.

Throughout this time, judges, court administrators, academics, and members of Congress have wrestled with difficult questions of calibration, including just how many judges are needed to populate the courts of appeals. As others have well documented before, a series of working groups and commissions were formed in the latter half of the twentieth century to consider court reform, including how the appellate courts should respond to their rising caseload.<sup>60</sup> A 1968 report by the American Bar Foundation, pointedly titled *Accommodating the Workload of the United States Courts of Appeals*, noted both the need for, but also difficulties inherent in, expanding those appellate courts.<sup>61</sup> Specifically, the Committee, led by Paul Carrington and including such distinguished members as Justice Thurgood Marshall, stated in the report that “it should be recognized that the expansion of the number of judges on a court, even though gradual in time, changes the nature of a court.”<sup>62</sup> They ultimately suggested, among other things, adding judges to existing circuits but then giving consideration to splitting the courts after a threshold of fifteen active judges was reached.<sup>63</sup>

From there, a different committee or commission considered the problem in each of the subsequent decades, with the Commission on Revision of the Federal Court Appellate System (also known as the Hruska Commission) in the 1970s,<sup>64</sup> the Federal Courts Study Committee in the 1980s,<sup>65</sup> and the Commission on Structural Alternatives for the Federal

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*Appeals Filed, Terminated, and Pending During the 12-Month Period Ending March 31, 2020*, ADMIN. OFF. OF THE U.S. CTS., tbl.B-8 (2020), <https://www.uscourts.gov/statistics/table/b-8/federal-judicial-caseload-statistics/2020/03/31> [<https://perma.cc/R34Y-7KYV>]. The two figures combined—51,694—divided by the number of federal appellate judgeships—179—equals approximately 288 filings per judgeship.

<sup>60</sup> See Menell & Vacca, *supra* note 5, at 813–41.

<sup>61</sup> See AM. BAR FOUND., *ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS* 5 (1968).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807, 807. For the Commission’s final report, see ROMAN L. HRUSKA ET AL., *COMM’N ON REVISION OF THE FED. CT. APP. SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE* (1975) [hereinafter *HRUSKA COMMISSION REPORT II*], <https://www.fordlibrarymuseum.gov/library/document/0019/4520540.pdf> [<https://perma.cc/P9YF-C59M>].

<sup>65</sup> See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, §§ 101–09, 102 Stat. 4642, 4644–45 (1988). For the Committee’s final report, see FED. CTS. STUDY COMM., *JUD. CONF. OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE* (1990) [hereinafter *FEDERAL COURTS STUDY COMMITTEE REPORT*], <https://www.fjc.gov/sites/default/files/2012/RepFCSC.pdf> [<https://perma.cc/2GED-6KP9>].

Courts of Appeals (also known as the White Commission) in the 1990s.<sup>66</sup> Each committee and commission stated that more judges were needed, but acknowledged how complex the task of adding them would be. The White Commission summed up the “conundrum” facing the courts of appeals thus:

On the one hand, if they do not obtain more judge power, they risk unacceptable backlogs of pending cases or an unacceptable decline in the quantity and quality of judicial attention paid to the cases they decide. On the other hand, adding too many judges to a court that must act collegially may heighten the likelihood of incoherence in the law.<sup>67</sup>

Such incoherence would be exacerbated, it was said, if a court grew too large to have functional en banc review.<sup>68</sup> The various committees and commissions ultimately made different reform proposals. Most notably, the Hruska Commission recommended that Congress split the Fifth and Ninth Circuits<sup>69</sup> and establish a National Court of Appeals, which would be placed between the Supreme Court and regional circuit courts and consist of a small cadre of judges who could help resolve splits that arose from the courts of appeals.<sup>70</sup> (There was initial enthusiasm for several of these plans, but the proposal for the National Court of Appeals stalled after several prominent judges came out strongly against it.<sup>71</sup>) One point of consensus among the Hruska Commission and the Federal Courts Study Committee was that the

<sup>66</sup> See Act of Nov. 26, 1997, Pub. L. No. 105-119, § 305(a)(1), 111 Stat. 2440, 2491. For the Commission’s final report, see FINAL REPORT, *supra* note 52.

<sup>67</sup> FINAL REPORT, *supra* note 52, at 59–60; see also HRUSKA COMMISSION REPORT II, *supra* note 64, at ix (noting that “[t]he creation of additional appellate judgeships” would be necessary, but cautioning that “an appellate court composed of more than nine judgeships loses in efficiency and in the collegiality essential to the optimum functioning of the judicial process”); FEDERAL COURTS STUDY COMMITTEE REPORT, *supra* note 65, at 117 (“Courts of appeals of twenty, thirty and even forty or more judges—distinct possibilities if caseloads continue to rise at present rates—may well be too large to provide the necessary coherency of case law within their circuits.”).

<sup>68</sup> See HRUSKA COMMISSION REPORT II, *supra* note 64, at 60 (“The major problems of managing a large circuit arise primarily in connection with en banc proceedings.”); FEDERAL COURTS STUDY COMMITTEE REPORT, *supra* note 65, at 115 (“The growth in the number of circuit judges is likely to continue, increasing the potential for in banc courts of unwieldy size.”); FINAL REPORT, *supra* note 52, at 61 (“[W]hen an appellate court operating as a single decisional unit reaches eighteen judgeships, the en banc process becomes too cumbersome to be feasible . . .”).

<sup>69</sup> See ROMAN L. HRUSKA ET AL., COMM’N ON REVISION OF THE FED. CT. APP. SYS., THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE 3–4 (1973) [hereinafter HRUSKA COMMISSION REPORT I].

<sup>70</sup> See HRUSKA COMMISSION REPORT II, *supra* note 64, at 5–39.

<sup>71</sup> See Menell & Vacca, *supra* note 5, at 822–23 (describing initial support for the National Court of Appeals and then a later set of hearings that included “mixed reactions from federal appellate judges,” such as Judge Henry Friendly, who was “staunchly opposed” to the establishment of the court, and how the reform effort then lost momentum).

successful functioning of the courts of appeals into the future would require the assistance of senior judges, as they were a vital source of workload support, and the courts therefore could not afford to make senior status undesirable.<sup>72</sup>

### *B. Senior Judges*

There was no such thing as a senior judge when Congress created the old circuit courts in 1789.<sup>73</sup> And there was still no such thing as a senior judge when Congress created the modern federal appellate courts just over a hundred years later.<sup>74</sup> But in the intervening years, Congress had created a pension system. Concerned by the prospect of judges remaining on the bench past the point they were fit for service, Congress enacted a statute that permitted judges of seventy years or older to “receive the same salary which was by law payable to [them] at the time of [their] resignation” if they had served for ten years.<sup>75</sup> But, as Burbank, Plager, and Ablavsky have thoughtfully detailed, resignation was the only option other than active service.<sup>76</sup> There was no middle ground.

In 1919 that changed.<sup>77</sup> Congress created a new option for judges who had reached retirement age: they could elect to leave active service but continue to decide cases and perform other judicial duties (while still receiving a full pension).<sup>78</sup> And the President could then appoint the judge’s

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<sup>72</sup> See HRUSKA COMMISSION REPORT II, *supra* note 64, at 64 (“In short, for the home circuit, senior judges offer the potential for significant contribution to the judge power of the court without the attendant disadvantages which typically accompany use of district court judges or an increase in the number of active judges on the court . . . . The Commission recommends a modest easing of the requirements for taking senior status.”); FEDERAL COURTS STUDY COMMITTEE REPORT, *supra* note 65, at 154 (“Congress should *not* enact disincentives to senior judge service. Effective federal court operations require maintaining the incentives that the current senior judge system affords.”). The Commission on Structural Alternatives for the Federal Courts of Appeals acknowledged the contribution of senior judges by noting that they were needed to fill out various panels but did not explicitly say that assuming senior status should be encouraged. See FINAL REPORT, *supra* note 52, at 48.

<sup>73</sup> The original circuit courts were created in the first Judiciary Act. See Judiciary Act of 1789, Pub. L. No. 1-20, § 4, 1 Stat. 73, 74–75. At that time, and for the following eighty years, “senior judges,” as they are called today, did not exist. See Burbank et al., *supra* note 18, at 4 (“During the first eighty years of the national government, there were three ways to leave the federal bench: removal following conviction after trial on articles of impeachment, resignation, and death.”).

<sup>74</sup> See Act of Mar. 3, 1891, ch. 517, § 2, 26 Stat. 826, 826–27.

<sup>75</sup> See Judiciary Act of 1869, ch. 22, § 5, 16 Stat. 44, 45 (codified as amended at 28 U.S.C. § 371(a)).

<sup>76</sup> See Burbank et al., *supra* note 18, at 7–8.

<sup>77</sup> See Act of Feb. 25, 1919, ch. 29, § 6, 40 Stat. 1156, 1157–58.

<sup>78</sup> See *id.* (“[I]nstead of resigning, any judge other than a justice of the Supreme Court, who is qualified to resign under the foregoing provisions, may retire, upon the salary of which he is then in receipt, from regular active service on the bench, and the President shall thereupon be authorized to appoint a successor; but a judge so retiring may nevertheless be called upon by the senior circuit judge of

successor.<sup>79</sup> Originally considered in 1869,<sup>80</sup> this middle ground was thought of as a clear “win-win” fifty years later. As the report from the House Judiciary Committee on 65 HR 12001 put it, “It is believed that the enactment of this provision will lead to further efficiency of the Federal courts without adding anything whatever in the way of expense for the additional services.”<sup>81</sup> The bill was enacted into law in February 1919.<sup>82</sup>

The general outline of what today is called “senior status” has remained in place for the past hundred years, with a few modifications. One such modification concerns nomenclature. The term “senior judge” only came into use in 1958; previously, such judges were referred to as “retired judges.”<sup>83</sup> (Earlier, the “senior circuit judge” of each appellate court, the presiding judge of the court, was the judge in regular active service with the greatest seniority; in 1948, that position morphed into the “chief judge,”<sup>84</sup> making the label “senior judge” available for the taking.) Another modification concerns eligibility. In 1937, senior status was extended to Supreme Court Justices.<sup>85</sup> However, while such Justices were and are today permitted to sit by designation on the lower courts, they may not continue to

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that circuit and be by him authorized to perform such judicial duties in such circuit as such retired judge may be willing to undertake . . .”).

<sup>79</sup> *See id.*

<sup>80</sup> *See* Burbank et al., *supra* note 18, at 8 (noting that permitting judges to leave regular active service but still hear cases was considered in the debate over the 1869 Judiciary Act and, indeed, written into the House bill, but was ultimately rejected “over the possibility of having twenty sitting Supreme Court Justices and discomfort over forcing superannuated judges to continue to work”).

<sup>81</sup> H.R. REP. NO. 65-573, at 6 (1918).

<sup>82</sup> *See* Act of Feb. 25, 1919 § 7, 40 Stat. 1156, 1158.

<sup>83</sup> *See* Act of Aug. 25, 1958, Pub. L. No. 85-755, § 5, 72 Stat. 848, 849.

<sup>84</sup> *See* Act of June 25, 1948, Pub. L. No. 80-773, §45, 62 Stat. 869, 871; *see also* Marin K. Levy & Jon O. Newman, *The Office of the Chief Judge*, 170 U. PA L. REV. (forthcoming 2021) (discussing the origin and significance of the role “chief judge”).

<sup>85</sup> *See* Act of Mar. 1, 1937, ch. 21, 50 Stat. 24, 24.

hear cases at the Supreme Court.<sup>86</sup> And unlike their lower court counterparts, such Justices are not referred to as “senior,” but as “retired.”<sup>87</sup>

More generally, as Burbank, Plager, and Ablavsky have argued, the role of senior judge shifted during this time from a semiretired judge who could assist a court on an emergency basis—like a judge sitting by designation<sup>88</sup>—to one who could routinely decide cases, albeit, at the senior judge’s election, fewer cases than heard by their active colleagues.<sup>89</sup> As part of this shift, the requirements for attaining senior status were relaxed. Whereas previously judges could only take senior status at or after the age of seventy as long as they had served on the bench for ten years or more, beginning in 1954 judges could do the same at or after the age of sixty-five with fifteen or more years of service.<sup>90</sup> Thirty years later the requirements were relaxed further—starting then, and continuing on through today, a judge can assume senior status at the age of sixty-five or after provided that their age plus their years on the federal bench equals eighty or more<sup>91</sup> (the so-called “Rule of 80”<sup>92</sup>). The financial incentives increased as well. Based on a 1948 law, senior judges today who complete a sufficiently substantial amount of work enjoy the “salary of the office”—meaning that they enjoy pay raises and cost-of-living adjustments alongside their active counterparts.<sup>93</sup>

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<sup>86</sup> See *id.*; see also Stras & Scott, *supra* note 21, at 474; *Demography of Article III Judges, 1789-2017*, FED. JUD. CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/age-and-experience-judges> [<https://perma.cc/6PZX-HC68>] (“Congress extended [the option of senior status] to Supreme Court justices in 1937, although justices following this path . . . do not continue to decide cases at the Supreme Court level.”).

Several of the current Supreme Court reform proposals rest on the idea of a number of current Justices becoming “senior Justices” and taking a reduced judicial role. See, e.g., Larry Kramer, Opinion, *Pack the Courts*, N.Y. TIMES (Oct. 27, 2020), <https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-reform.html#kramer> [<https://perma.cc/Y4CX-RUAF>]; Jack Balkin, *Don’t Pack the Court, Regularize Appointments*, BALKINIZATION (Oct. 5, 2020, 11:00 AM), <https://balkin.blogspot.com/2020/10/dont-pack-court-regularize-appointments.html> [<https://perma.cc/HJV4-9TRT>].

<sup>87</sup> See *Demography of Article III Judges, 1789-2017*, *supra* note 86.

<sup>88</sup> See generally Marin K. Levy, *Visiting Judges*, 107 CALIF. L. REV. 67 (2019) [hereinafter Levy, *Visiting Judges*] (detailing the practice of sitting by designation at the federal courts of appeals).

<sup>89</sup> See Burbank et al., *supra* note 18, at 91–92.

<sup>90</sup> Act of Feb. 10, 1954, Pub. L. No. 294, § 4, 68 Stat. 8, 12.

<sup>91</sup> Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 204, 98 Stat. 333, 350.

<sup>92</sup> See *Demography of Article III Judges, 1789-2017*, *supra* note 86.

<sup>93</sup> See Act of June 25, 1948, ch. 646, §§ 294, 371, 372, 62 Stat. 869, 901, 903–04. To be eligible, senior judges can, among other things, assume a workload equal to or greater than 25% of an active judge’s workload. See Ethics Reform Act of 1989, Pub. L. No. 101-194, § 705, 103 Stat. 1716, 1770.



These various laws together create the framework of assuming senior status in the modern day.<sup>94</sup> Again, when judges satisfy the Rule of 80, they may elect to take senior status and, in so doing, decide what percentage of an active judge's work to take on.<sup>95</sup> (Though, they must work at least a quarter of an active judge's workload to be eligible for salary increases and must have the chief judge of their court certify that they have met that threshold.<sup>96</sup>) And they may maintain a set of chambers and staff, though the number of staff they are allotted generally depends upon the workload they take on each year.<sup>97</sup> Today, there are more than one hundred senior judges in the federal courts of appeals,<sup>98</sup> and according to the most recent statistical tables from the Administrative Office of the U.S. Courts, resident senior judges participated in nearly 25% of all cases in the past year.<sup>99</sup>

Part of why a good number of judges have elected to take senior status is that the statutory scheme provides considerable financial advantages for doing so. Specifically, the income senior judges earn is not subject to social security taxes,<sup>100</sup> nor is it subject to income taxes in many states.<sup>101</sup>

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<sup>94</sup> A few commentators have stressed how complicated this framework is. *See e.g.*, Stras & Scott, *supra* note 21, at 459 (noting that “[v]ery few people . . . understand the complex set of statutes that authorizes and regulates senior status”).

<sup>95</sup> *See* 28 U.S.C. § 371(c), (e)(1); Stras & Scott, *supra* note 21, at 470–71.

<sup>96</sup> *See* 28 U.S.C. § 371(e)(1). Senior judges may also perform judicial duties outside of their circuit when designated and assigned by the Chief Justice of the United States. *See id.* § 294(d).

<sup>97</sup> In 1950, the Judicial Conference resolved that the judicial council of each circuit should set the standards for the allowable staff of senior judges. *See* Burbank et al., *supra* note 18, at 40 (citing ADMIN. OFF. OF THE U.S. CTS., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 22 (1950), <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1950-09.pdf> [<https://perma.cc/4RVX-YTYP>]). A few circuits have their own policies regarding staffing. For example, senior judges are “generally” permitted two law clerks in the Eighth Circuit. *See* U.S. CT. OF APPEALS FOR THE EIGHTH CIR., INTERNAL OPERATING PROCEDURES 5 (2019), <https://ecf.ca8.uscourts.gov/newrules/coa/IOP.pdf> [<https://perma.cc/22LA-HMGT>].

<sup>98</sup> This figure was arrived at by examining the Federal Judicial Center’s Biographical Directory of Article III Judges. *See Biographical Directory of Article III Federal Judges: Export*, *supra* note 25.

<sup>99</sup> ADMIN. OFF. OF THE U.S. CTS., JUDICIAL FACTS AND FIGURES tbl.2.6 (2019), [https://www.uscourts.gov/sites/default/files/data\\_tables/jff\\_2.6\\_0930.2019.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jff_2.6_0930.2019.pdf) [<https://perma.cc/4CN8-9XYP>].

<sup>100</sup> *See* 26 U.S.C. § 3121(i)(5).

<sup>101</sup> *See* Scott & Stras, *supra* note 21, at 461 (first citing 26 U.S.C. § 3121(a)(5)(B) (excluding annuity plans from the definition of “wages” taxable under the Federal Insurance Contributions Act (FICA)); then citing *id.* § 3121(i)(5) (excluding payments to retired judges from the definition of “wages” taxable under FICA); and then citing Darryl Van Duch, *Senior Judge Ranks Close Vacancy Gap*, NAT’L L.J., July 22, 1996, at A22).

Additionally, the provision that limits outside income for teaching to 15% of a judge's salary<sup>102</sup> does not apply to senior judges.<sup>103</sup>

But there are some potential drawbacks as well—namely, as non-active judges, senior judges are not permitted to decide cases as part of an en banc court unless they were on the original panel that heard the case at hand.<sup>104</sup> One might wonder why not being allowed to participate in en banc review should be considered a drawback—after all, en banc hearings can be quite time-consuming and acrimonious.<sup>105</sup> One might also wonder how relevant such a drawback—assuming it is a drawback—is, given that en banc review happens infrequently, with less than 1% of appeals decided by the court as a whole.<sup>106</sup> Part of the reason being excluded from en banc review is considered such a downside to taking senior status concerns the import of the cases that go en banc; as Burbank, Plager, and Ablavsky have noted, en banc hearings provide “one of the major vehicles for creating new or particularly important law at the circuit level.”<sup>107</sup> Another part is that by being a member of the en banc court (and by being able to vote to take cases en banc), judges have an avenue for trying to reverse a panel decision that they find objectionable.<sup>108</sup> More subtly, there is the dynamic that exists in the shadow of en banc review—namely, that judges can help shape the law of their circuit by keeping alive the possibility that they might go en banc on a particular matter (thereby affecting the panel members' behavior in the first instance). Accordingly, this statutory prohibition is generally understood to be a significant drawback to “going senior.”<sup>109</sup>

While this statutory regime might seem comprehensive, it in fact leaves open a number of different matters—matters that can create additional incentives or disincentives for taking senior status. Specifically, it falls to

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<sup>102</sup> See 5 U.S.C. app. § 501(a).

<sup>103</sup> See *id.* § 502(b)(2).

<sup>104</sup> See 28 U.S.C. § 46(c).

<sup>105</sup> See Neal Devins & Alli Orr Larsen, *Going En Banc 3* (unpublished manuscript) (on file with journal) (“Going en banc takes a lot of time and often results in discord . . . .”); Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 218 (1999) (“In addition to the material costs such as delay, judicial inefficiency, administrative expense, and attorneys' fees, seeking one voice can produce the opposite effect by causing intracourt acrimony, ideological polarization, and lost collegiality.” (footnote omitted)).

<sup>106</sup> See Devins & Larsen, *supra* note 105, at 8 (citing Ryan W. Copus, *Statistical Precedent: Allocating Judicial Attention*, 73 VAND. L. REV. 605, 608 (2020) (“The courts now review a mere 0.19% of decisions en banc, down from 1.5% in 1964.”)).

<sup>107</sup> Burbank et al., *supra* note 18, at 81.

<sup>108</sup> See *id.* at 81–82.

<sup>109</sup> See Rymer, *supra* note 9, at 322 (“Three-judge panels make decisions understanding that if a majority of their colleagues disagree on an important issue, their decision will be reconsidered en banc.”).

individual courts to decide basic matters such as whether senior judges will retain their chambers or be moved to a less desirable space to make room for a new judge, whether two senior judges (or only one) may sit on a panel of three, and whether senior judges may vote on court administrative matters. One might assume that the federal courts of appeals had formulated a uniform set of answers to such questions—but not if one were a student of judicial administration. The circuit courts vary widely in their own practices and customs,<sup>110</sup> and, as the next Part details, their treatment of senior judges is no exception.

## II. FINDINGS: VARIATIONS IN THE TREATMENT OF SENIOR JUDGES

The choices that courts make about how they will run as institutions can have far-reaching consequences. And indeed, decisions about how judges will be treated upon assuming senior status can affect whether some judges will opt to assume that status or remain active,<sup>111</sup> as I describe further in Part III. But it can be a complex task to piece together precisely how all of the different federal courts of appeals operate and what choices about senior status they have made.

Specifically, some information about senior status is published, though not consistently in the same sources. For example, some details can be found in some courts' local rules, whereas other details are found in internal operating procedures (I.O.P.s). However, some relevant information is not published and therefore not publicly available at all. Indeed, this particular data can only be gathered by interviewing and surveying judges and court administrators. This project relied on all of these sources and forms of data collection.

First, as part of a larger research project with Judge Jon O. Newman on the internal operation of the federal courts of appeals,<sup>112</sup> the local rules and I.O.P.s that are publicly available were searched for pertinent references to the treatment of senior judges. Second, all current (and several recent) chief judges of the federal court of appeals were interviewed.<sup>113</sup> Finally, a detailed

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<sup>110</sup> See generally Levy, *The Mechanics of Federal Appeals*, *supra* note 51 (documenting the widespread variation in case management and staffing approaches across the courts of appeals).

<sup>111</sup> This Essay is focused on judges who wish to continue performing their judicial functions, and so the relevant choice is between doing so as an active judge or a senior one. Of course, decisions about how judges are treated in senior status could also impact a judge's decision ultimately to retire. For a greater exposition of judicial retirement and the factors that go into a judge's decision to leave the judiciary outright, see generally Burbank et al., *supra* note 18.

<sup>112</sup> See NEWMAN & LEVY, *supra* note 26.

<sup>113</sup> These interviews took place throughout the 2020 calendar year. Most were conducted via video conferencing, although a few were conducted by telephone. As per past practice, these interviews were

questionnaire was sent to senior court administrators of all thirteen circuits, and written answers were received back from twelve of them to date.<sup>114</sup>

Together, the data from these different sources tell an important story about the way senior judges are treated in the federal courts of appeals. What follows is a descriptive account of several practices concerning senior judges, ranging from those involving en banc and regular panel procedures to those touching on certain scheduling and even opinion-writing preferences of seniors. To be sure, this Part is not meant to be a perfectly comprehensive list; the goal is not to specify how each and every circuit approaches all of the topics here. Rather, the goal is to note the range of different practices—that one circuit does X where several other circuits do Y—while providing some illustrative examples. In so doing, this Part documents just how much variation there is in the treatment of senior judges from circuit to circuit—variation that can, in some instances, also be the key to future reform.

#### A. *En Banc Panels and Regular Panels*

As noted in the previous Part, one of the most significant changes that occurs when one takes senior status is no longer being able to participate in en banc court decisions, unless the judge was on the original panel to decide the case.<sup>115</sup> Furthermore, a senior judge is not authorized to participate in the court's en banc poll—that is, the vote about whether the case will be heard by the court as a whole.<sup>116</sup> These matters are all governed by statute and federal rule.<sup>117</sup> But there is a key point of en banc process concerning senior judges that is not addressed by statute or federal rule, meaning local rules and customs come into play.

Although senior judges may not themselves vote in an en banc poll, there is the question of whether a senior judge may call for such a poll. In other words, does a senior judge have the authority to formally bring a case to the court's attention and prompt a vote among its active members to decide whether to rehear it all together? In the Ninth Circuit, senior judges are permitted to call for an en banc poll, regardless of whether they were part of

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semi-structured (and were on additional topics related to judicial administration for a larger research project being conducted with Judge Jon O. Newman). Again, as per past practice, all of the interviews were conducted following assurances of anonymity. For an example of a past study with these parameters, see Levy, *Visiting Judges*, *supra* note 88, at 103–04.

<sup>114</sup> Specifically, as of December 7, 2020, survey responses were received back from the D.C., First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Federal Circuits.

<sup>115</sup> See 28 U.S.C. § 46(c).

<sup>116</sup> See FED. R. APP. P. 35(a).

<sup>117</sup> See *supra* notes 115–116 and accompanying text.

the original panel to hear the case.<sup>118</sup> By contrast, other circuits, including (but not limited to) the Seventh and Tenth, permit senior judges to call for an en banc poll only if they were part of the merits panel.<sup>119</sup>

Beyond the questions that arise from en banc review are questions associated with ordinary panels that hear appeals in the first instance. While senior judges are, of course, permitted to hear cases as part of regular argument panels, there is the matter of how many may sit together. In some circuits, including the Third and the Ninth, two senior judges may sit together as long as there is an active judge to round out the trio.<sup>120</sup> By contrast, in other circuits, including the Fourth and Federal Circuits, oral argument panels generally will not include more than one senior judge.<sup>121</sup>

### *B. Administrative Matters*

In addition to deciding cases, the judges of the courts of appeals also come together at court meetings to decide various administrative matters. These matters can be quite important for how the court conducts business—for example, these matters can include changes to the court’s local rules. Active judges attend and vote on administrative matters, but different circuits have different rules about the extent to which senior judges may have a hand in deciding such matters.

Specifically, there is significant variation when it comes to voting at court meetings. By custom or local provision, senior judges of some circuits, including (but not limited to) the D.C., Seventh, Ninth, and Tenth Circuits, are permitted to vote on administrative matters at court meetings.<sup>122</sup> In contrast, senior judges do not vote on administrative matters in other circuits,

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<sup>118</sup> See NEWMAN & LEVY, *supra* note 26 (discussing survey data from the Ninth Circuit) (survey response on file with author).

<sup>119</sup> See *id.* (discussing survey data from the Seventh and Tenth Circuits) (survey responses on file with author). The Second Circuit falls somewhere in between the circuits described above. Formally, the Second Circuit permits a senior judge to request an en banc poll to rehear a decision if the judge was on the original panel. 2D CIR. INTERNAL OPERATING PROC. 35.1(a). That said, a senior judge who was not on the original panel in that circuit may ask the chief judge to call for an en banc poll. See NEWMAN & LEVY, *supra* note 26 (discussing data from an interview regarding the Second Circuit conducted on November 5, 2020) (transcript on file with author).

<sup>120</sup> See NEWMAN & LEVY, *supra* note 26 (discussing survey data from the Third and Ninth Circuits) (survey responses on file with author); 9TH CIR. R. E(5).

<sup>121</sup> See NEWMAN & LEVY, *supra* note 26 (discussing survey data from the Fourth Circuit) (survey response on file with author); FED. CIR. R. 47.2(a).

<sup>122</sup> See NEWMAN & LEVY, *supra* note 26 (discussing survey data from the D.C., Seventh, Ninth, and Tenth Circuits) (survey responses on file with author); U.S. CT. OF APPEALS FOR THE D.C. CIR., HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES 4 (2019); 7TH CIR. OPERATING PROC. 2(a); 9TH CIR. GEN. ORD. 10.2(a).

including the Second, Third, and Fifth (though it was noted that in the Second, senior judges receive all memoranda regarding administrative matters and may express their views on such matters in court meetings).<sup>123</sup>

*C. Seating of Judges, Order of Judges on Opinions, and Chambers*

A layperson may not think much about where a judge sits in relation to other panel members during oral argument or ceremonial events. Similarly, those outside the law and perhaps most outside of the judiciary may not notice the order in which the judges are listed on an opinion. But this suite of topics, which we might put under the heading “precedence accorded senior judges,” can matter a great deal as signs of respect to the judges themselves.

Beginning with seating arrangements, in most circuits senior judges have precedence over active judges when determining how the judges will be placed along the bench for oral argument. Specifically, this is so in the First, Second, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Federal Circuits.<sup>124</sup> This means the presiding judge—the most senior active judge on the panel—will sit in the center, the senior judge will sit to the presider’s right, and the most junior judge will sit to the presider’s left.<sup>125</sup> However, not all courts of appeals follow this approach. For example, active judges have precedence over senior judges in seating on such panels in the D.C., Third, Fourth, and Eleventh Circuits.<sup>126</sup>

At formal events such as an investiture ceremony for a new judge, a memorial session for a deceased judge, or a portrait unveiling, the whole court is often seated together along a single bench. As with Supreme Court Justices, the federal appellate judges generally sit in order of seniority. But there is a question of where senior judges should be placed—toward the center of the court or out at the flanks. Some circuits, by custom, give precedence to senior judges, meaning the judges are arranged by strict seniority and the senior judges end up closest to the center of the bench.<sup>127</sup> Others, however, give precedence to active judges, meaning the senior

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<sup>123</sup> See NEWMAN & LEVY, *supra* note 26 (discussing survey data from the Second, Third, and Fifth Circuits) (survey responses on file with author).

<sup>124</sup> See *id.* (discussing survey data from the First, Second, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Federal Circuits) (survey responses on file with author).

<sup>125</sup> See *id.* (discussing survey data from the Tenth Circuit) (survey response on file with author).

<sup>126</sup> See NEWMAN & LEVY, *supra* note 26 (discussing survey data from the D.C., Fourth, and Eleventh Circuits) (survey responses on file with author); 3D CIR. INTERNAL OPERATING PROC. 3.2.

<sup>127</sup> See *id.* (discussing survey data from, among others, the First, Seventh, Eighth, Ninth, and Federal Circuits) (survey responses on file with author).

judges are seated at the edges of the bench, after the most junior of their colleagues.<sup>128</sup>

The order of judges is also relevant to the caption of opinions and orders of the court. Specifically, there is a question of whether judges should be listed strictly on the basis of seniority (after the chief judge) or whether senior judges should be placed below active judges. In the Third and Fourth Circuits, for example, senior judges are listed after active judges on opinions and orders, whereas in other circuits, including (but not limited to) the First, Second, Fifth, and the Seventh, the opposite is true.<sup>129</sup>

Finally, while slightly further afield, similar questions arise when it comes to the chambers a judge will keep. A judge may be particularly attached to his or her chambers, which are akin to a mini office suite that he or she will have occupied for years if not decades. In many circuits, by custom, senior judges are permitted to retain their chambers and continue to use them indefinitely.<sup>130</sup> In contrast, judges in at least one circuit may have to give up their chambers and move to space that is less centrally located to make room for the newly appointed members of their court.<sup>131</sup> Perhaps unsurprisingly, as detailed in Part III, the potential loss of chambers is of great importance to some active judges considering senior status.

#### *D. Honoring the Preferences of Senior Judges*

Most active judges have very little say in when they will hear argument throughout the year.<sup>132</sup> While it is possible in some circuits to ask not to sit on a specific day because of a preexisting conflict, most judges are assigned to particular sitting days throughout the year and those are the dates when they will sit.<sup>133</sup> Senior judges have the ability to decide *how often* they will sit—such as, say, a half or even a quarter of the sitting days of their active

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<sup>128</sup> See *id.* (discussing survey data from the D.C. Circuit) (survey response on file with author).

<sup>129</sup> See *id.* (discussing survey data from the First, Second, Third, Fourth, Fifth, and Seventh Circuits) (survey responses on file with author).

<sup>130</sup> See *id.* (discussing survey data from, among others, the First, Seventh, Eighth, and D.C. Circuits) (survey responses on file with author).

<sup>131</sup> See *id.* (discussing data from an interview regarding the Federal Circuit conducted on July 21, 2020) (transcript on file with author). And in at least one other circuit, some senior judges may need to share visiting chambers when coming in from out of town for oral argument. See *id.* (discussing survey data from the Sixth Circuit) (survey response on file with author).

<sup>132</sup> See Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 CORNELL L. REV. 65, 81–93 (2017) [hereinafter Levy, *Panel Assignments*] (describing the factors that court administrators take into account when setting the oral argument calendar, with particular scheduling requests of active judges playing a very minor role).

<sup>133</sup> See *id.*

colleagues.<sup>134</sup> But in some circuits, senior judges are also able to decide *when* they will sit.<sup>135</sup> Specifically, in the Second Circuit, senior judges submit to the chief judge particular dates when they would like to sit in the upcoming year—say, the first two weeks of September and October, but not in November or December.<sup>136</sup> In a related vein, some, but not all, circuits permit judges to decide *where* they will sit. For example, the Ninth Circuit, with several hearing locations, provides that senior judges will not be given sittings that are taking place far afield from their own chambers unless the judge specifically elects to do so.<sup>137</sup>

Honoring the preferences of senior judges can extend beyond the calendar and into the voting conference. After a sitting, the three judges of a panel must decide: first, which cases will be decided by published opinions; second, how each panel member expects to vote in each case; and third, who will author each opinion. In the Second Circuit, there is a custom whereby the panel presider asks a senior judge which opinion the judge would like to write or would prefer not to write—and the request is generally honored.<sup>138</sup> Comparable customs are found in other circuits, including the First and Seventh.<sup>139</sup> However, in other circuits, including the Fourth, Ninth, and Federal Circuits, there is no norm or custom in place to honor the opinion-writing preferences of senior judges.<sup>140</sup>

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In short, there are significant differences between the experiences of senior judges from circuit to circuit. There is a value in documenting these variations in their own right, as part of a larger project of understanding the unwritten practices and norms of the federal courts of appeals. But it also stands to reason that these differences are of consequence. As the next Part details, some of these differences, particularly cumulatively, could impact

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<sup>134</sup> See 28 U.S.C. § 294(b); see also Albert Yoon, *As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure*, 2 J. EMPIRICAL LEGAL STUD. 495, 511 (2005) (“Senior judges enjoy discretion not afforded to active judges with respect to the number of cases they adjudicate . . .”).

<sup>135</sup> Levy, *Panel Assignments*, *supra* note 132, at 85–86.

<sup>136</sup> *Id.* at 86.

<sup>137</sup> See 9TH CIR. GEN. ORD. 3.2(c).

<sup>138</sup> See NEWMAN & LEVY, *supra* note 26 (discussing survey data from the Second Circuit) (survey response on file with author).

<sup>139</sup> See *id.* (discussing survey data from the First and Seventh Circuits) (survey responses on file with author).

<sup>140</sup> See *id.* (discussing survey data from the Fourth, Ninth, and Federal Circuits) (survey responses on file with author).



how soon certain judges are willing to assume senior status after they are eligible.

### III. REFORM PROPOSAL: ALTERING PRACTICES TO MAKE SENIOR STATUS MORE ATTRACTIVE

Parts I and II each have their own lessons to offer when it comes to considering potential judicial reforms going forward. As Part I details, for much of the existence of the courts of appeals, there have been concerns that there are too few judges for the caseload at hand.<sup>141</sup> Even with the workload currently down from its high point in the early 2000s, it is still higher than it was the last time judgeships were added to the federal courts of appeals, now thirty years ago.<sup>142</sup> And so, there is a strong argument that the bench should be enlarged again.<sup>143</sup>

That said, there are challenges that come with expanding the bench outright. First, as previously noted, there are several logistical difficulties that attend the creation of new judgeships. Each time judges, court administrators, scholars, and members of Congress have examined the issue, they have raised concerns about existing circuits becoming too large, particularly for a single en banc review.<sup>144</sup> Indeed, approximately half of the existing circuits have exceeded or are close to fifteen active judgeships,<sup>145</sup> which has been considered an upper bound for manageable en banc courts.<sup>146</sup>

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<sup>141</sup> See *supra* Section I.A.

<sup>142</sup> Again, it is worth noting that one judgeship was reassigned from the D.C. Circuit to the Ninth Circuit, effective January 21, 2009. See *supra* note 50.

<sup>143</sup> Indeed, the Judicial Conference of the United States recently recommended the modest addition of five new permanent judgeships (all in the Ninth Circuit). See ADMIN. OFF. OF THE U.S. CTS., ADDITIONAL JUDGEShips OR CONVERSION OF EXISTING JUDGEShips RECOMMENDED BY THE JUDICIAL CONFERENCE tbl.1 (2019), [https://www.uscourts.gov/sites/default/files/2019\\_judicial\\_conference\\_judgeship\\_recommendations\\_0.pdf](https://www.uscourts.gov/sites/default/files/2019_judicial_conference_judgeship_recommendations_0.pdf) [<https://perma.cc/EFY3-6EUH>].

<sup>144</sup> See *supra* note 68 and accompanying text.

<sup>145</sup> See 28 U.S.C. § 44(a) (listing the number of allotted judges per circuit, including thirteen in the Second, fourteen in the Third, fifteen in the Fourth, seventeen in the Fifth, sixteen in the Sixth, and twenty-nine in the Ninth).

<sup>146</sup> The Hruska Commission specifically noted that, at the time, the Fifth Circuit had fifteen active judges, and that “[s]erious problems of administration and of internal operation inevitably result with so large a court . . . . For example, it becomes more difficult to sit en banc . . . .” HRUSKA COMMISSION REPORT I, *supra* note 69, at 1–2. It was precisely because of these concerns that Congress soon after declared that a court with more than fifteen active judges may determine by local rule the number of judges that serve on an en banc court. See Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633. But even fifteen may be too high. The Ninth Circuit experimented with a fifteen-member en banc court only to quickly abandon the plan, as argument proved “unwieldly” and the opinion process “prone to delay,” in favor of an eleven-judge en banc court. See Marsha S. Berzon, *Introduction*, 41 GOLDEN GATE U. L. REV. 287, 288–89 (2011).

An alternative would be splitting a number of existing circuits, but this is not a particularly attractive approach either. It is difficult to see how each circuit could retain the features often thought important when drawing geographical boundaries—chief among them, encompassing more than a single state and not dividing states—and how the judiciary as a whole would not begin to fragment.<sup>147</sup>

Beyond the problem of logistical or implementation costs, there are political and even legitimacy costs to contend with. The public discourse in the run-up to the 2020 election was dominated by debates around court-packing.<sup>148</sup> It is unclear if Congress would be inclined to expand the intermediate appellate courts in the near future, but if it is, a significant expansion would surely be cast as politically motivated. And regardless of what political cost Congress might be charged, if charged at all, I fear the greater cost would be borne by the judiciary. As others have argued, the perceived legitimacy of our court system might suffer if made the object of an alleged court-packing plan.<sup>149</sup>

So, this Essay's reform proposal is a straightforward one: look within the judiciary itself to try to alleviate workload burdens. Specifically, the proposal is to focus on a number of the practices and procedures that affect senior judges, as outlined in Part II, and encourage the courts of appeals to adopt those that would make taking senior status more attractive. This reform would therefore be judge-generated, unlike so many of the proposals today that would have the political branches act upon the courts.<sup>150</sup>

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<sup>147</sup> See THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 56 (1994) (noting the criteria that the Hruska Commission employed when considering splitting circuits, including that circuits should be composed of at least three states); Carl Tobias, *Why Congress Should Not Split the Ninth Circuit*, 50 SMU L. REV. 583, 594 (1997) (citing HRUSKA COMMISSION REPORT I, *supra* note 69, at 237) (describing the problems of a one-state circuit, as articulated by the Hruska Commission, including that such a circuit would lack diversity among its judges and that the senators from a single state could ultimately shape the judicial selections of an entire federal appellate court); Martha Dragich, *Back to the Drawing Board: Re-Examining Accepted Premises of Regional Circuit Structure*, 12 J. APP. PRAC. & PROCESS 201, 205 (2011) (considering the structure of the federal courts of appeals and concluding, among other things, that the principle of having each circuit contain at least three states “preserve[s] the generalist tradition of the federal courts and promote[s] uniformity of federal law, at least weakly,” and that the principle against splitting a single state between two or more circuits helps to ensure a uniform interpretation of state law). *But see* HRUSKA COMMISSION REPORT I, *supra* note 69, at 13 (recommending that California be split into two circuits). For concerns about fragmentation of the judiciary, see *supra* note 10 and accompanying text.

<sup>148</sup> See *supra* notes 11–12 and accompanying text.

<sup>149</sup> See sources cited *supra* note 17.

<sup>150</sup> See, e.g., Balkin, *supra* note 86 (proposing that “[t]he President appoint[] a new [Supreme Court] Justice in every odd-numbered year” and that “Congress create[] two en banc courts” with the first composed of all active Justices and meant for deciding the Court’s original jurisdiction cases, and the second composed only of the nine most junior Justices and meant for deciding the Court’s appellate

To be sure, this recommendation is not particularly revolutionary; indeed, the 1968 report by the American Bar Foundation, noted earlier, suggested as much, arguing that “stronger incentives should be provided for acceptance of senior status by Circuit Judges eligible to do so.”<sup>151</sup> The recommendations of this Essay, though, are based upon the finer details of the internal operating practices of the courts of appeals and opportunities for change that are not even necessarily known to all those within the courts themselves.

In particular, courts would do well to consider implementing the following policies and rules where they are not already in place. First, accommodate, where possible, basic preferences of senior judges. Such preferences include those related to sittings—for example, in the circuits that hear cases on a rolling basis,<sup>152</sup> wishing to hear argument during certain months and not others, and in the circuits that hear argument in multiple locations,<sup>153</sup> wanting to not travel too far afield from their home station. Additionally, more courts could be solicitous of the preferences of senior judges when it comes to opinion assignments, and specifically could do more to honor a request from a senior to select (or reject) a particular writing assignment at a sitting.

Second, courts could do more to lower what I will call the “dignitary” costs that attend taking senior status. For example, all of the courts of appeals could keep the precedence of judges after they take senior status. There is no need to list judges on opinions in an order other than one dictated by straight seniority. And avoiding a scenario in which judges are moved lower down in the panel order after taking senior status prevents what might look like the signaling of a demotion. Similarly, at ceremonial functions—investiture

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jurisdiction cases); Kramer, *supra* note 86 (arguing that Congress should expand the Supreme Court, and specifically endorsing a proposal that would add a new Justice in each Congress, with only the nine most junior Justices deciding cases that are part of the Court’s regular docket).

<sup>151</sup> See AM. BAR FOUND., *supra* note 61, at 3.

<sup>152</sup> Courts that hear cases on a rolling basis stand in contrast with those that have designated weeks for hearing argument. See Levy, *Panel Assignments*, *supra* note 132, at 67 n.4.

<sup>153</sup> Whereas some circuits hear argument predominantly in one location (the D.C. Circuit in Washington, D.C., the Second Circuit in New York City), others routinely hear argument in multiple locations (the First Circuit in Boston and Puerto Rico, the Ninth Circuit in Anchorage, Pasadena, San Francisco, Seattle, and so forth). See *Oral Argument Calendar*, U.S. CT. OF APPEALS FOR THE D.C. CIR., <https://www.cadc.uscourts.gov/internet/sixtyday.nsf/fullcalendar?OpenView&count=1000> [https://perma.cc/V99Q-ES8P]; *Calendars*, U.S. CT. OF APPEALS FOR THE SECOND CIR., <https://www.ca2.uscourts.gov/clerk/calendars/calendars.html> [https://perma.cc/2DNV-YS5Z]; *Calendar Information*, U.S. CT. OF APPEALS FOR THE FIRST CIR., <https://www.ca1.uscourts.gov/calendar-information> [https://perma.cc/Z8JS-BGF8]; *Previous Oral Argument Dates and Locations*, U.S. CTS. FOR THE NINTH CIR., <https://www.ca9.uscourts.gov/calendar/archive.php> [https://perma.cc/QQH8-8UXN]; see also 28 U.S.C. § 48 (noting the locations where the courts of appeals “shall hold regular sessions”).

ceremonies of a new judge and the like—there is no apparent reason for seating senior judges “on the wings” of the bench, placing them below, in stature, their most junior colleagues. And finally, within this topic, greater efforts could be made to ensure that senior judges are able to maintain their chambers, where possible. While this may seem an expensive proposition, the question is always about the relevant point of comparison. If the alternative is adding judgeships full stop and needing to build out new chambers in any event, this option is no more expensive and ensures that judges need not feel that they are being displaced from the office space that they have inhabited, sometimes for decades, all to make room for someone new.

Third, courts would do well to consider eliminating what may be unnecessary distinctions between senior judges and active ones. For example, circuits should examine existing rules that prevent more than one senior judge from sitting on a panel, when other courts permit two.<sup>154</sup> And, perhaps more importantly, courts that currently prohibit senior judges from voting on administrative matters should reconsider their policy. If there are concerns that a judge who feels distant from the bench—who perhaps sits only a handful of days a year—is having an equal say in important matters before the court, the circuits could consider instituting a threshold. For example, circuits could insist that a senior judge carry at least a 25% workload, the same threshold for being eligible for pay increases,<sup>155</sup> to vote on court matters in order to mitigate such concerns. The larger point is that there need not be such a strong demarcation between senior judges and active judges in these respects.

The broader argument is that changes along these lines—particularly when made together—could make senior status more attractive to at least some eligible judges. And while one could argue that it simply stands to reason that these changes could be dispositive for some, there is no need to speculate. Thanks to the foundational work of Burbank, Plager, and Ablavsky, we have survey data from judges—both those who decided to go senior and those who decided to remain active—about the factors relevant to

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<sup>154</sup> See *supra* notes 120–121 and accompanying text. It is certainly possible that the downside risks would predominate over the benefits of permitting more than one senior judge to sit on a panel, particularly if a given circuit has a sizeable number of senior judges who are older and not sitting so often (and thus are less connected to the court’s current decisions). But given the benefits—that a change could help incentivize eligible judges to take senior status, particularly if some judges do not want to miss the opportunity to sit with others in their cohort—it is at least worth considering this potential policy change. With many thanks to Aaron-Andrew Bruhl for this point.

<sup>155</sup> See *supra* note 93 and accompanying text.

their decision.<sup>156</sup> Regarding the category of judges who opted to take senior status when eligible, on average, the motivating factors in descending order were: (1) wanting “the federal tax advantages senior status affords,” (2) “other interests made [them] want a lighter case load,” (3) wanting “to help the court by creating a vacancy,” and (4) wanting “to be selective about [their] case load,” with all being ranked “somewhat important.”<sup>157</sup> But perhaps even more telling than these results were the additional comments that several of the respondents made to the authors about their experience as senior judges. Specifically, “several circuit judges in senior status criticized either their inability to preside and make opinion assignments, their inability to vote whether en banc review of a panel decision should occur . . . , or the inability even of those carrying a significant load to be active in administrative work.”<sup>158</sup> Other respondents stressed the dignitary costs associated with the shift, noting that they did not like the title “senior judge” as it suggested a state of retirement to the bar and the public.<sup>159</sup> One respondent remarked that the “treatment of seniors on my court has caused a number of judges to delay going senior.”<sup>160</sup>

Burbank et al. further note that in response to a questionnaire sent to the circuit executives of the courts, one court administrator mentioned that senior judges occasionally expressed displeasure about the loss of chambers and the ability to decide “certain court matters.”<sup>161</sup> This response also noted “anecdotal evidence that some judges have delayed taking senior status over such concerns”<sup>162</sup>—something Burbank, Plager, and Ablavsky noted was reflected in comments that they had heard directly from judges.

Regarding the category of judges who were eligible to take senior status but had not yet elected to do so, Burbank et al. collected similarly instructive data. When asked why they had decided to remain in regular active service instead of assuming senior status, the average responses of judges, after noting a desire to remain active in en banc hearings and to retain their current caseload and staffing levels, next ranked in importance “keep[ing] [their] chambers” and wanting not “to surrender [their] seniority for the purpose of presiding, opinion assignment, ceremonial occasions, etc.”—with all rated at least “somewhat important.”<sup>163</sup>

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<sup>156</sup> See Burbank et al., *supra* note 18, at 42–55, 78–83.

<sup>157</sup> See *id.* at 45.

<sup>158</sup> *Id.* at 51 (footnotes omitted).

<sup>159</sup> See *id.*

<sup>160</sup> See *id.* at 53.

<sup>161</sup> See *id.*

<sup>162</sup> *Id.*

<sup>163</sup> See *id.* at 45, 79–80.

These additional findings suggest that if more could be done for senior judges—to ensure that they not lose their chambers, to provide them some choice in opinion assignment, to not have them be “demoted” in rank on opinions and at ceremonial functions, and the like—more eligible judges would make the transition. This, in turn, would create more vacancies for the courts of appeals without adding new judicial seats. Accordingly, it would increase the judge power of the federal appellate courts while leaving the en banc courts untouched, thereby limiting at least some concerns about undermining the uniformity in circuit law.

To be sure, these proposed reforms, even if implemented in every circuit, would not be sufficient to persuade every eligible judge to take senior status. There are some judges who have not become senior for reasons that cannot, or should not, be “fixed.” For example, as the data above suggest, there are some judges who put a great deal of stock into being part of their court’s en banc proceedings.<sup>164</sup> And while it would be possible to change the requirement that members of the en banc court be active judges (aside from a senior judge who was on the original panel), doing so would not be easy nor advisable. This requirement is set forth by statute, unlike the other policies and rules mentioned here.<sup>165</sup> Furthermore, there are legitimate concerns about expanding the en banc court significantly, as previously noted.<sup>166</sup> Accordingly, the proposals outlined above will not be able to reach those who wish to remain in regular active service for reasons related to en banc proceedings.

Additionally, there are presumably those who have not taken senior status because they are hoping that the administration will soon change and would like a president of their party to nominate their successor. If this consideration is important to a judge, ensuring that panel members are listed on an opinion in the order of strict seniority will not move the needle. That said, it is important to recognize that not all, or even necessarily most, judges fall into this category. Returning to the survey of eligible judges, Burbank et al. asked if the respondents were “waiting for a different appointing authority (i.e., a different political administration) to nominate my successor” and the mean response was that this consideration was of little importance—a 2.1 out of 7.<sup>167</sup> Put differently, this factor was ranked, on average, eleventh out of fourteen in relative importance.<sup>168</sup> It is entirely possible that the judges

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<sup>164</sup> See *id.* at 79.

<sup>165</sup> See 28 U.S.C. § 46(c).

<sup>166</sup> See *supra* note 9 and accompanying text.

<sup>167</sup> See Burbank et al., *supra* note 18, at 79.

<sup>168</sup> See *id.* at 79–80.

underreported just how salient the party of the next president was to them, although there are other studies that suggest it has not been the key consideration for most judges historically.<sup>169</sup> It is also worth noting that of the judges who are currently eligible to assume senior status at the end of President Trump's Administration, while there are more who were appointed by Democrats than appointed by Republicans, there is a healthy mix of both.<sup>170</sup> The larger point is that it stands to reason that changes to *some* of the practices and norms outlined in Part II could help entice *some* eligible judges to assume senior status. Even if only 10% of the current eligible judges decided to take senior status based upon changes to these policies, we would have six new vacancies—or one more judgeship than the Judicial Conference recently requested.<sup>171</sup>

Moreover, the hope is that by changing these policies and having some additional judges take senior status, yet more judges could become inclined to do the same. A judge might not wish to take senior status if she is the only one in her cohort considering the proposition, but she might feel differently if a few others on her court decided to take the plunge.

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<sup>169</sup> See, e.g., Richard L. Vining, Jr., *Politics, Pragmatism, and Departures from the U.S. Courts of Appeals, 1954–2004*, 90 Soc. SCI. Q. 834, 850 (2009) (finding that “[e]vidence of strategic political behavior is limited” whereas “[p]ersonal considerations were significant” and “[p]ension eligibility was influential as predicted” on timing of leaving active status). While there is general agreement that pension eligibility is a critical factor in the timing of taking senior status, there is less agreement about whether, and to what extent, political factors play a role. See Terri Peretti & Alan Rozzi, *Modern Departures from the U.S. Supreme Court: Party, Pensions, or Power?*, 30 QUINNIPAC L. REV. 131, 138–47 (2011) (noting studies that found evidence of strategic retirement, including David C. Nixon & J. David Haskin, *Judicial Retirement Strategies: The Judge's Role in Influencing Party Control of the Appellate Courts*, 28 AM. POL. Q. 458, 485 (2000), and James F. Spriggs, II & Paul J. Wahlbeck, *Calling It Quits: Strategic Retirement on the Federal Courts of Appeals, 1893–1991*, 48 POL. RSCH. Q. 573, 592–93 (1995), and those that did not, including Albert Yoon, *Pension, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1869–2002*, 8 AM. L. & ECON. REV. 143, 155 (2006)). It is also certainly possible that political factors have played a more pertinent role in recent times, and at least one study is underway to measure those effects. See Josh Blackman, *Which Ninth Circuit Judges Were Waiting for a Democratic President to Take Senior Status?*, REASON (Nov. 30, 2020, 1:38 PM), <https://reason.com/volokh/2020/11/30/which-ninth-circuit-judges-were-waiting-for-a-democratic-president-to-take-senior-status/> [<https://perma.cc/F443-4HD2>] (noting that the author, Josh Blackman, and James Phillips are in the process of studying appellate judges who strategically time their decision to take senior status, including during recent administrations).

<sup>170</sup> This figure was arrived at by examining the Federal Judicial Center's Biographical Directory of Article III Judges. See *Biographical Directory of Article III Federal Judges: Export*, *supra* note 25. Specifically, of the sixty-four judges who I calculated to be eligible to take senior status as of December 4, 2020, twenty-seven were appointed by Republican presidents in the first instance and thirty-seven were appointed by Democratic presidents in the first instance. If the president who appointed a judge to his or her final appointment is counted instead (say, to a judge's seat on the court of appeals after initially being appointed to a district court), the figures are twenty-six judges who were appointed by Republican presidents and thirty-eight judges who were appointed by Democratic presidents.

<sup>171</sup> See ADMIN. OFF. OF THE U.S. CTS., *supra* note 143.

All that said, it is important to note that there are further limitations to this set of proposals, beyond that they will almost certainly not reach all of the judges who are eligible, though none appears to be fatal. If Congress creates a new judgeship, the receiving court has the benefit of one additional active judge. If, instead, an active judge takes senior status, there is still only one active judge associated with that seat, and the benefit is the service provided by the senior judge. That senior judge could choose to take a full caseload but might well take less. Furthermore, many of the judges who would take senior status as soon as eligible under the proposed policy changes would likely take senior status at some point anyway—these changes would simply move up the timeline. (And so, a judge who might have waited until the age of seventy-five might now take senior status at sixty-five instead.) Taken together, the point is that the workload help that comes from a judge taking senior status as soon as possible is not equal to the help that comes from creating a new judicial seat. If the senior judges continued to take a full or nearly full workload, that help would still be considerable—but it is a limited solution.

Another limitation in theory is that the additional judge power will not necessarily be added where it is needed most. When Congress decides to add new judgeships at the behest of the Judicial Conference, it is done after considering which courts are most in need given their workloads.<sup>172</sup> This Essay's reform proposal is not circuit-specific, and one may wonder if the circuits most in need have a large enough pool of judges who are eligible to take senior status and an opportunity to further incentivize "going senior." Based upon the data, the answer appears to be yes to both. Perhaps unsurprisingly to students of judicial administration, the circuit most in need of assistance is the Ninth Circuit Court of Appeals, and the Judicial Conference recently recommended that five new judgeships be added there and there alone.<sup>173</sup> Currently, the Ninth Circuit has more than ten judges who are eligible to take senior status who have not yet done so.<sup>174</sup> And based upon the findings in Part II, there are practices the circuit could alter to make senior status more attractive—for example, the court could give senior judges their first choice in opinion assignment coming out of a sitting.<sup>175</sup> But even if this

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<sup>172</sup> See *Judiciary Makes the Case for New Judgeships*, ADMIN. OFF. OF THE U.S. CTS. (June 30, 2020), <https://www.uscourts.gov/news/2020/06/30/judiciary-makes-case-new-judgeships> [<https://perma.cc/32PL-GPSA>].

<sup>173</sup> See ADMIN. OFF. OF THE U.S. COURTS, *supra* note 143.

<sup>174</sup> See *Biographical Directory of Article III Federal Judges: Export*, *supra* note 25.

<sup>175</sup> See *supra* notes 138–140 and accompanying text (detailing how some circuits, the Ninth not among them, give senior judges preference when determining opinion authors).



were not the case and the most overburdened of the circuits had no practices that could be made more favorable to senior judges, the federal courts of appeals have a built-in solution. Senior judges from the less burdened courts could sit by designation on those that are more burdened and help decide cases.<sup>176</sup> This system of visiting judges is widely used today, particularly by the Ninth Circuit,<sup>177</sup> which recently had visiting judges author over 8% of its written opinions.<sup>178</sup> And while not a perfect solution to the mismatch problem, it would ensure that the courts that are most in need of help ultimately receive assistance.

Finally, it is important to note that these proposals are not without their costs. There are logistical and even economic costs to contend with. Assuring that senior judges will maintain their chambers may be particularly difficult in some circuits with limited available space, such as the Federal Circuit.<sup>179</sup> And even for courts with chambers outside of Lafayette Square, it might be quite costly to permit senior judges to retain their chambers. As noted earlier, if the alternative is that the senior judge maintains active status and a new judgeship is created and new chambers are constructed, the costs should be comparable. But it is worth noting that a new judgeship may not be the alternative if Congress is disinclined to act.

There are other costs that are harder to quantify. For example, having a rule whereby senior judges are given their first choice of opinion assignment, while helpful for making senior status more attractive, may come at the expense of the presider's powers and prerogatives. This would not seem to be a significant issue, as some circuits already have such a norm in place, and it has not caused any reported problems. But it is worth noting that there may be costs that come with these reforms—costs that appear to be offset by the gains in judge power, but costs worth noting nonetheless.

Relatedly, it is possible that providing judges with more incentives to take senior status would be viewed as politically motivated—an attempt to

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<sup>176</sup> See Levy, *Visiting Judges*, *supra* note 88, at 98–101 (describing the modern-day practices of sitting by designation and how the practices operate officially to support overburdened courts).

<sup>177</sup> See *Judges Help Judges When Courts Face Heavy Caseloads*, ADMIN. OFF. OF THE U.S. CTS. (Nov. 8, 2018), <https://www.uscourts.gov/news/2018/11/08/judges-help-judges-when-courts-face-heavy-caseloads> [<https://perma.cc/XY5S-MWEZ>] (noting that “[t]he Ninth Circuit Court of Appeals welcomed more than 60 visiting judges for intercourt assignments in 2017, sitting for a combined total of about 200 days”).

<sup>178</sup> See U.S. CTS. FOR THE NINTH CIR., 2018 ANNUAL REPORT 47 (2019), [https://www.ca9.uscourts.gov/judicial\\_council/publications/AnnualReport2018.pdf](https://www.ca9.uscourts.gov/judicial_council/publications/AnnualReport2018.pdf) [<https://perma.cc/A9JK-VZFU>].

<sup>179</sup> The Federal Circuit is famously housed in a complex that includes historic homes on the east side of Lafayette Square, right near the White House in Washington, D.C. See generally GEORGE E. HUTCHINSON, *THE HISTORY OF MADISON PLACE, LAFAYETTE SQUARE, WASHINGTON, D.C.* (2d ed. 2008).

indirectly create vacancies during a particular presidential administration. While this is certainly possible, the hope is that tinkering with the finer details of how senior judges are treated—especially by the courts and not by Congress—would not be understood to remotely resemble court-packing.

Moreover, the larger goal, as noted earlier, is that more judges will take senior status as soon as they are eligible, which would mean fewer would wait for a president of a particular political party to be elected. If norm-building is possible, the process could ultimately make the creation of vacancies *less* political, not more. More broadly, the judges themselves could solve not all, but certainly some, of their own workload problems and simultaneously help keep their branch of government above not all, but certainly some of the political fray.

#### CONCLUSION

As we consider the larger project of judicial reform, we should recognize that it is not always necessary to think in big, structural terms. Surely there are times when it is appropriate to reimagine a key element of our court system. Indeed, if it were not for such times, we would not have the modern-day courts of appeals. But there is also value in taking smaller steps towards change. Just as solutions to problems of court capacity can come from expanding the bench, so, too, can they come from focusing on judicial perceptions, behaviors, and norms.

Ultimately, this Essay's reform proposal involves modest changes that could create substantial benefits for the federal courts of appeals. Its promise lies with appreciating the finer details of court administration, including which can feasibly be altered. Just as importantly, its promise lies with not relying upon the actions of the elected branches, but upon changes that can be made by the courts themselves.